BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Opinion of the Court Below

The official report of the opinion of the U. S. Circuit Court of Appeals for the Second Circuit in this proceeding has not yet been published.

II. Jurisdiction

This Court has jurisdiction to review the judgment below under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. A. Title 28, Section 347, 42 Stat. 938).

III. Statutes and Regulations Involved

The Statutes and Regulations involved are set forth in the Appendix *infra,* pages 15 to 23, inclusive.

IV. Statement of the Case

The Petitioner, Insular Sugar Refining Corporation, during the years involved in this proceeding was engaged in refining sugar in the Philippine Islands (R. 30) and selling about 90% of its production in the United States through Balfour, Guthrie & Co., Limited of San Francisco (R. 31-32).

Petitioner customarily purchased in the United States containers for its sugar, burlap cotton lined and cotton bags, through its parent Company and its agent, Balfour, Guthrie & Co., Limited (R. 31).

Bags purchased to be used as containers for sugar sold in the Philippine Islands were marked by the manufacturer with brand name "Suchar." Bags purchased for

sugar to be imported and sold in the United States were marked with the brand names "Snowflake" and "Quick-melt" (R. 62).

During the year 1935, Petitioner purchased and exported 1,201,028 such bags to its refinery in the Philippines (R. 53, 90; Pet. Ex. A). Cotton processing taxes had been paid on these bags by the manufacturer, Pacific Diamond H. Bag Company (R. 31, 50). When the bags were exported, the manufacturer filed claims and in 1936 collected "drawbacks" totaling $6,358.68 (R. 32), as agent for Petitioner (R. 148).

Later the Respondent mailed to Petitioner a 90-day letter claiming an "unjust enrichment tax" on these drawbacks (R. 9). This proceeding resulted.

V. Specification of Errors

The Circuit Court of Appeals erred:

1. In holding "drawbacks" paid under Section 17(a) of the Agricultural Adjustment Act subject to unjust enrichment tax;

2. In deciding that petitioner was not entitled to exemption from unjust enrichment tax under Section 501(b) of the Revenue Act of 1936;

3. In concluding that the applicable statutory provisions required, as a condition to exemption from unjust enrichment tax, that petitioner prove that it had not passed on the tax refunded to it in the form of drawbacks.

VI. Summary of Argument

The majority of the Circuit Court of Appeals, in sustaining the 80% tax on the "drawbacks" received by the Petitioner, have reached a result in conflict with the pur-

pose of the Congress in providing for "drawbacks" and contrary to its intent in imposing an unjust enrichment tax. In denying exemption to Petitioner they have placed a construction on the statutory provisions involved which is unnecessary and erroneous.

ARGUMENT

POINT I

The imposition of an unjust enrichment tax on "drawbacks" is inconsistent with the intent of the Congress in providing for the payment of drawbacks and contrary to its expressed intent in enacting the Unjust Enrichment Tax Law.

The "drawbacks" of processing tax, on which the Respondent here seeks to impose an unjust enrichment tax, were allowed under Section 17(a) of the Agricultural Adjustment Act (Title 7, Chapter 26, Sec. 617(a), U. S. C. A.), because the bags on which this processing tax had been paid, were exported to the Philippine Islands. This statute provided:

> "*Upon the exportation to* any foreign country (and/or to *the Philippine Islands,* the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam) *of any product* processed wholly or partly from a commodity *with respect to which product* or commodity *a tax had been paid* or is payable under this chapter, *the tax due and payable or due and paid shall be credited or refunded* • • •.
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> Under regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, a credit or refund shall be allowed to the consignor named in the bill of lading under which the product is exported or to the shipper or to the person liable for the tax provided

the consignor waives any claim thereto in favor of such shipper or person liable for the tax." (Italics supplied.)

(Re-enacted by Section 601 of the Revenue Act of 1936 and amended to apply only to refunds on goods exported before January 1, 1936.)

The purpose of such drawbacks is to exempt exports from tax. In *Campbell, et al.* v. *United States*, 107 U. S. 407, this Court said at page 413:

> "The purpose of the drawback provision is to make duty-free, imports which are manufactured here and then returned whence they came or to some other foreign country."

On the basis of this legislative intent to make exports tax-free, rights created by Section 17(a) of the Agricultural Adjustment Act as re-enacted by Section 601(a) of the Revenue Act of 1936 have been held exempt from the other provisions of that Act relating to taxes illegally assessed and collected. *Cudahy Bros.* v. *LaBudde*, 92 F. (2d) 937, C. C. A. 7th Cir. In that case the Court said at page 938:

> "It will be observed that originally Congress, by section 17 (48 Stat. 40), with the obvious intent of stimulating exportation and foreign trade and to relieve the country of an undesirable domestic surplus, placed exported goods in an exempt class, against which no tax was intended to be assessed or collected. It went even further and provided that one exporting commodities might, upon giving bond to the Secretary of the Treasury, process the commodity and export same without payment of any tax. That exported goods were exempt and that Congress intended by the exemption to encourage exportation is evidenced by the further provision of the section that any tax paid should be refunded to the consignor so exporting and to no other person, except at the direction of the consignor. This provision was similar to other so-called 'drawback'

statutes, one of which was before the Supreme Court in *Asiatic Petroleum Co.* v. *Insular Collector,* 297 U. S. 666, 56 S. Ct. 651, 80 L. Ed. 967, where the purpose of exemption was commented upon, and another in *Campbell et al.* v. *United States,* 107 U. S. 407, 2 S. Ct. 759, 763, 27 L. Ed. 592, where the Court remarked that when Congress declared that upon exportation a 'drawback' of the duty paid, should be allowed, there 'resulted a contract that when exported the government would refund, repay, pay back, this amount as a drawback to the importer.' Thus, we observe, appellee sought to recover no taxes collected under an invalid statute *but rather refund of taxes previously paid, upon proof that the commodity taxed had gone into exportation.*"

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(p. 939)

"We conclude that Congress, by its reenactment of section 17, recognized the cause of action and the established remedy therefor; that *to place the consignor of exported goods declared by law to be exempt from taxation in the same category with processors who are suing to recover taxes illegally collected under an invalid act of Congress and to require them to conform to a procedure which is inapplicable to their situation* and the details of which, under the regulations of the commissioner, are wholly inapplicable to the facts in the case of exportation, *is to do violence to the intent of Congress.* We believe that Congress has not rescinded its obvious intent to exempt exported goods from taxation, but rather, that its intent was to protect in good faith those persons whom it induced to make exportation under an act providing for such exemption and by re-enactment of section 17(a) to recognize the obligation to perform the government's contract with such exporting consignors." (Italics supplied.)

Contrary to this decision of the Circuit Court of Appeals for the Seventh Circuit holding such procedure "wholly inapplicable" to drawbacks, both the Tax Court

and the majority of the Court below erroneously decided that this Petitioner must prove that it had "not passed on the processing tax" which was the subject of the "drawback."

The intent of the Congress that such drawbacks should be exempt from unjust enrichment tax appears clearly in the report of the Senate Finance Committee, *Senate Report No. 2156,* pages 25-26, where the Committee in discussing the Unjust Enrichment Tax Law stated:

> "The principal amendments proposed by your Committee are as follows: • • •
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> "(2) There is excluded from the computation of unjust enrichment the income relating to transactions of such character that the non-payment or recovery of the amount of the excise tax can be assumed not to have constituted a windfall. These cases are enumerated in Section 501(b) (explained below) • • •:
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> "§ 501(b)—This is a new provision. It excludes from the computation of income resulting in unjust enrichment • • • *any income from which articles with respect to which some statutory provision for refund existed, as in the case of exports,* charitable deliveries, etc." (Italics supplied.)

POINT II

Petitioner is entitled to exemption under Section 501(b) of the Unjust Enrichment Tax Law.

(a) The statutory provision imposing the unjust enrichment tax specifically exempts repayments to taxpayers entitled to the refund otherwise than as an illegal collection.

Section 501(b) of the Revenue Act of 1936 provides:

> "(b) The net income • • • shall not include the net income • • • from Federal excise tax with respect to any article,

"* * * (3) If, under the terms of any statute the taxpayer would have been entitled to a refund from the United States of the Federal excise tax with respect to the article otherwise than as an erroneous or illegal collection * * *."

"(j) (5) The term 'taxpayer' means a person subject to a tax imposed by this section."

(b) Petitioner comes within the exempt class.

Section 501(b)(3) makes the exemption applicable "if *under the terms of any statute,* the taxpayer *would have been* entitled to a refund * * * of the Federal Excise Tax * * *."

It defines taxpayer as "a person subject to a tax imposed by this section (the unjust enrichment tax).

Under Regulations 83, Art. 3 (App., p. 15), promulgated by the Respondent, either the consignor or "the person for whom the consignor * * * is handling the product for shipment" was authorized to file a claim for drawback pursuant to Section 17(a) of the Agricultural Adjustment Act.

Pacific Diamond H. Bag Company, the consignor, was "handling the bags for Petitioner."

The bags subjected to processing tax in this case became the property of the Petitioner prior to the time of export (a) because they were unconditionally appropriated to Petitioner by Diamond H. Pacific Bag Company when the brand names were printed on the bags, under which Petitioner's sugar was sold (Netherton Dep. 24-25), and (b) because they were delivered to the carrier by Diamond H. Pacific Bag Company "for the purpose of transmission" to Petitioner (R. 145).

California Civil Code, Dir. III, Part 4, Title 1, Chapter 2, Article 1, Section 1739 (*Hillyers Consolidated Supplement to the California Code 1927-1931,* Part 1, p. 5538), provides:

> "Rule 4. 1. *Where there is a contract to sell unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer.* Such assent may be expressed or implied and may be given either before or after the appropriation is made.
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> "2. Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract." (Italics supplied.)

As the bags became the property of the Petitioner before they were exported, in delivering the bags to the carrier, Diamond H. Pacific Bag Company was "handling" the bags for the Petitioner. Under *Regulations 83, Article 3, supra,* petitioner was, therefore, the shipper and entitled to exemption under Section 501(b)(3) as one who "**would have been entitled to a refund** from the United States of the Federal excise tax with respect to the article otherwise than as an erroneous or illegal collection * * *."

The decision of the majority of the Court below, however, denies the exemption because

> "the actual consignor had not waived its right to claim the refund—as required by statute—but had actually made such claim and received the refund" (R. 145).

This view ignores the fact that in drafting Section 501(b) Congress used the words "if under the terms of any statute the taxpayer *would have been entitled to a refund*" and interprets it as if Congress had said instead that a taxpayer should only be entitled to the exemption

if it "has claimed and *received a refund* * * *." The language of Section 501(b), *supra,* as enacted, obviously was not intended to restrict the exemption to cases where taxpayer itself had filed a claim based on some ground other than illegal or erroneous collection and on the basis of that claim had received the refund in question.

If the right to such a refund existed, the refund is exempt no matter how the taxpayer obtained the repayment in issue.

As Judge HINCKS pointed out in his dissenting opinion below (R. 147):

> "The use of the past subjunctive 'would have been entitled' clearly imports a contrary to the fact condition which, since not expressed, must be implied. And plainly the condition to be implied is in substance the situation and the legal relationships which existed after the exportation had been accomplished and Insular had paid the processing tax to its vendor Diamond *and before Diamond had collected a refund of the tax from the government.*" (Italics supplied.)
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> * * * * * * *
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> (R. 148)
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> "To be sure, to perfect a claim for refund in its own name as shipper—which it was—Insular would have needed among other things Diamond's waiver. But there is utterly nothing in the record to suggest that Diamond, which had already acknowledged Insular's beneficial interest in the refund, would not have cooperated to that end by voluntarily furnishing the necessary waiver of its right as consignor. And if it had objected, the relationship of the parties was such that Insular could have compelled the execution of the necessary waiver. Thus viewed, in the situation which the statute envisaged Insular 'would have been entitled' to the refund and to any waiver by Diamond necessary to effectuate the refund."

The right to a refund under any Federal revenue statute is subject to various conditions. Among other requirements, the taxpayer must file a claim before the expiration of the Statute of Limitations, and that claim must contain the basis for recovery on which any later suit for a refund is brought. Obviously, it cannot have been intended by the Congress that in order that a taxpayer be entitled to exemption under Section 501(b) it must show that it has complied with all these conditions. The words *"would have been entitled"* negatives such a construction.

In order to be entitled to exemption under this Section it is only necessary that a taxpayer show that it had rights which, if enforced, would have resulted in its receiving the refunds in question. The fact that it did not enforce these rights or go through the required procedure is immaterial in so far as the application of this exemption provision is concerned. **The existence of the rights determined the exempt status.**

This construction of the statute in question, as Judge HINCKS has concluded in his dissenting opinion, is (R. 149):

> "wholly consistent with the applicable Revenue Act and the Agricultural Adjustment Act. Yet it gives effect to the clear Congressional intent, just referred to, to save our foreign trade from the dampening effect of the processing tax,—an objective which is frustrated if the proceeds of the drawbacks are subjected to the windfall tax."

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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